RECENT DECISIONS.

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BAIL—DISCHARGE—PRESUMPTION OF DEATH.—The disappearance of the accused at the time of a tornado, *held* not to exonerate his bail from liability on their bond. *Bryan* v. *State* (Ark. 1914) 167 S. W. 484.

It is well settled that bail will be exonerated where the appearance of the principal is rendered impossible by an act of the law, see *Taylor* v. *Taintor* (1872) 16 Wall. 366, an act of the obligee, *State* v. *Funk* (1910) 20 N. Dak. 145, or an act of God, such as the death of the principal. *Pynes* v. *State* (1871) 45 Ala. 52. While sickness of the principal will not discharge the sureties, since they stand bound until he is able to appear, *Bonner* v. *Commonwealth* (Ky. 1905) 85 S. W. 1196, if they subsequently bring the accused into court, his sickness will be a good defense to an action on the bond, *People* v. *Tubbs* (1868) 37 N. Y. 586, or a ground for vacating a judgment rendered against them. *Russell* v. *State* (1872) 45 Ga. 9. The liability of the bail attaches at the time of forfeiture, but where the impossibility arises subsequently, and before final judgment on the bond, the sureties are generally released. *Mather* v. *People* (1850) 12 Ill. 9; *State* v. *Traphagen* (1883) 45 N. J. L. 134. Where the accused has disappeared and his continued absence is unexplained, death may be inferred from circumstances presenting a strong probability of death. *Merritt* v. *Thompson* (N. Y. 1858) 1 Hilt. 550. The presumption, in such a case, that life continues for seven years, *Montgomery* v. *Bevans* (C. C. 1871) 1 Sawy. 653; see 9 Columbia Law Rev. 435, may be rebutted by proof of facts from which an inference might be drawn that death occurred before the lapse of seven years; as, for example, that the absent person within that time encountered some specific peril or came within the range of some impending danger which might reasonably be expected to destroy life. *Merritt* v. *Thompson, supra*; *Davie* v. *Briggs* (1878) 97 U. S. 628, 634. All the circumstances should be considered, however, and in the principal case the motive for concealment afforded by the criminal indictment would strongly militate against such inference of death. See *Wolff's Estate* (Pa. 1883) 12 Wkly. Notes Cas. 535; *Northwestern Ins. Co.* v. *Stevens* (C. C. A. 1895) 71 Fed. 258.

BANKRUPTCY—TITLE OF TRUSTEE—WIDOW'S RIGHTS AFTER DEATH OF BANKRUPT.—A Georgia statute provided that the widow and children of an insolvent should receive a year's support out of the estate possessed by him at the time of his death. The plaintiff's husband was adjudicated bankrupt, and died after the appointment of a trustee. *Held,* the widow is entitled to the allowance made by the local statute, under § 8 of the Bankruptcy Act. *Hull* v. *Dicks* (1915) 35 Sup. Ct. Rep. 152.

It is provided by § 8 of the Bankruptcy Act of 1898 that the death or insanity of a bankrupt shall not abate the proceedings; but that the widow and children shall not be deprived thereby of any rights of dower or allowance granted by the State of the bankrupt's residence. Of course, since the common law dower of the wife is a

vested interest, it has never been affected by the sale of the bankrupt's lands. See *Porter* v. *Lazear* (1883) 109 U. S. 84; *Thomas* v. *Woods* (C. C. A. 1909) 173 Fed. 585. It has been held, however, that if a statute giving dower or allowances expressly limits the rights to the estate held by the husband at the time of his death, they are not saved by the proviso in § 8, in cases where the bankrupt dies after the trustee has taken title under § 70a. *In re McKenzie* (C. C. A. 1905) 142 Fed. 383. But since the bankrupt may affect a composition with his creditors or claim a homestead by way of exemption, other courts have held that he has an estate left in which the widow has rights and which limits the title of trustee. *In re Slack* (D. C. 1901) 111 Fed. 523; *In re Dicks* (D. C. 1912) 198 Fed. 293. The principal case bases its decision largely on the ground that the proviso in § 8 must be read to mean that the widow and children retain the same rights they would have possessed had no trustee been appointed. It may be supported as effecting the apparent intention of the proviso, although it can hardly be doubted that the Georgia statute was never intended to confer rights in an estate which had passed out of the hands of the deceased. *Summerford* v. *Gilbert* (1867) 37 Ga. 59.

BILLS AND NOTES—BONA FIDE PURCHASERS FOR VALUE—USURY.—In an action by a *bona fide* holder in due course against the maker of a note and its indorsers, the defense of usury in its inception was *held* not to be available. *Emanuel* v. *Misicki et al.* (1914) 149 N. Y. Supp. 905.

When a negotiable instrument given for a usurious consideration is made absolutely void by statute, it remains so even in the hands of a *bona fide* purchaser for value, Norton, Bills & Notes (4th ed.) 311; *Claflin* v. *Boorum* (1890) 122 N. Y. 385, and since such statutes are declarative of a rule of public policy it would seem that such a note even in the hands of a holder in due course should not be rendered valid on any theory of estoppel against the maker. *Cf. Kyser* v. *Miller* (1908) 144 Ill. App. 316; but see *Claflin* v. *Boorum, supra.* Where a note, valid in its inception, is subsequently transferred as part of a usurious transaction, it is generally held that the maker or the indorser can defend against the indorsee and all subsequent takers on the ground that the transfer of the note for usurious consideration passed no title. Norton, Bills & Notes (4th ed.) 315. It has sometimes been said, however, that not only a *bona fide* purchaser for value but even a party to the usury may maintain an action against the maker. See *Armstrong* v. *Gibson* (1872) 31 Wis. 61; *Knights* v. *Putnam* (Mass. 1825) 3 Pick. 184; but see *Freeman* v. *Brittin* (1839) 17 N. J. L. 191. In some jurisdictions the statute expressly reserves the right of a *bona fide* holder for value, see *Robinson* v. *Smith* (1895) 62 Minn. 62, and it has been held that where the statute makes usury a personal defense at the instance of the debtor, such defense is not available against a holder in due course. See *Bradshaw* v. *Van Valkenberg* (1896) 97 Tenn. 316. In New York the statute declaring void contracts made for usurious consideration, has been held by the Appellate Term to be amended by the provisions of the Negotiable Instruments Law with reference to *bona fide* purchasers, so as to permit such holders to recover upon a note usurious in its inception, *Klar* v. *Kostiuk* (N. Y. 1909) 65 Misc. 199; *contra, Crusins* v. *Siegman* (N. Y. 1913) 81 Misc. 367, and it was upon this authority that the court in the principal case based its decision.

CONSTITUTIONAL LAW—ALIEN LABOR LAW—EMPLOYMENT OF ALIENS ON PUBLIC WORKS.—The defendant was fined for violating § 14 of the Labor Law, providing that no aliens should be employed on the construction of public works. *Held,* the judgment should be reversed because the statute was contrary to the Fourteenth Amendment. *People* v. *Crane* (N. Y. 1914) 150 N. Y. Supp. 933. See Notes, p. 263.

CONSTITUTIONAL LAW—FREEDOM OF CONTRACT—NON-MEMBERSHIP IN LABOR UNION AS CONDITION OF EMPLOYMENT.—A statute of Kansas made it unlawful to require as a condition of employment that the employee shall not become or remain a member of any labor organization. *Held,* three judges dissenting, the statute is unconstitutional. *Coppage* v. *Kansas* (U. S. Sup. Ct., October Term, 1914, No. 48). Not yet reported.

The right of a person to determine whose labor he will buy is as well recognized as the right to sell his labor to anyone he pleases. A party has, moreover, a right to stipulate the conditions upon which he will enter into the relation of employment. 2 Tiedeman, State & Federal Control of Persons & Property, § 204. But this right is not protected as an absolute one by the Due Process Clause of the Constitution, and the State may, under its police powers, impose any restraint upon it that is reasonably necessary for the general welfare of the public. See *Holden* v. *Hardy* (1898) 169 U. S. 366; *Chicago, etc. R. R.* v. *McGuire* (1911) 219 U. S. 549. The court, in the main case, argues that the advantages and inequalities, which are the direct result of our constitutional protection of the right of freedom of contract and private property, cannot be done away with by statute. But protective labor statutes which have this very object have been upheld as a valid exercise of the police power, *McLean* v. *Arkansas* (1909) 211 U. S. 539; *Erie R. R.* v. *Williams* (1914) 233 U. S. 685, and it would seem, therefore, that the real consideration is whether there is a general governmental necessity or public demand for the particular legislation. It might be urged, indeed, that the statute has the effect of promoting harmonious relations between capital and labor, and so would seem valid as an exercise of the police power to preserve the public welfare as well as the economic liberty of the employee. *Cf.* Freund, Police Power, § 500. But the cases in the States show decidedly that this particular manner of protection is not based upon a predominating public opinion or demand, *People* v. *Marcus* (1906) 185 N. Y. 257; *Gillespie* v. *People* (1900) 188 Ill. 176, and so the court is amply sustained by authority in following its previous position that such legislation is an unwarranted interference with the freedom of contract. *Adair* v. *United States* (1908) 208 U. S. 161; 8 Columbia Law Rev. 301.

CONSTITUTIONAL LAW—HOURS OF LABOR—REST DAY.—A statute provided that an employer of labor in a factory or mercantile establishment should allow employees at least twenty-four consecutive hours of rest in every seven consecutive days. *Held,* this was a proper exercise of the police power. *People* v. *Klinck Packing Co.* (N. Y. 1915) 52 N. Y. L. J. 1925.

Statutes regulating conditions and hours of labor are within the police power when they can be regarded as necessary sanitary measures. See Freund, Police Power 302. So it has been held that it is a valid exercise of the police power to provide a ten hour a day labor law for

women working in laundries, *Muller* v. *Oregon* (1908) 208 U. S. 412, or an eight hour law for persons engaged in mining occupations. *Holden* v. *Hardy* (1897) 169 U. S. 366. While this power is not unlimited and the restriction on the right to contract or labor must bear a reasonable relation to the public welfare, see *Lochner* v. *New York* (1905) 198 U. S. 45, the courts are inclined to uphold a statute which does not effect material restraints upon individual liberty, and is obviously for the general welfare of the public. Sunday labor laws fall within this class of legislation, *cf.* 4 Blackstone Comm. *63, and have been generally sustained on the theory that they provide for a day of rest, which is promotive of the public welfare, 1 Tiedeman, State & Federal Control of Persons and Property, 213, 222; see *Hennington* v. *Georgia* (1896) 163 U. S. 299; *Judefind* v. *State* (Md. 1894) 22 L. R. A. 721 and note, although there have been a few decisions supporting the observance of Sunday as a religious institution. See 1 Tiedeman, State & Federal Control of Persons and Property, 211. If the state may designate a certain day as a day of rest from labor, it could, *a fortiori,* provide for a day of rest and leave the determination of the particular day to the employer, since this results in even less restraint upon individual liberty.

CONTRACTS—PUBLIC POLICY—EXEMPTION OF COMMON CARRIER FROM TORT LIABILITY.—The plaintiff in consideration for the construction of a spur track upon its premises, agreed to exempt the defendant railroad from all liability for damages by fire resulting from the operation of trains upon the track. *Semble,* the contract is not void as against public policy. *Carolina etc. Ry.* v. *Unaka Springs Lumber Co.* (Tenn. 1914) 170 S. W. 591.

Contracts which tend to promote negligence on the part of a common carrier in the discharge of its public obligations are regarded as conflicting with public policy. See Burdick, Torts (3rd ed.) 88. Construction of side tracks for the convenience of private owners, however, is not ordinarily an obligation of a common carrier, and a railroad may therefore contract to be exempt from damages for fires caused by its negligent operation of the spur. *Missouri etc. Ry.* v. *Carter* (1902) 95 Tex. 461, 474; *Porter* v. *New York etc. R. R.* (1910) 205 Mass. 590; *Mann* v. *Pere Marquette R. R.* (1903) 135 Mich. 210. Moreover, it has been held that the exemption in such cases may be made to include operations on the main track as well. *Mayfield* v. *Southern Ry.* (1910) 85 S. C. 165; *Richmond* v. *New York etc. R. R.* (1904) 26 R. I. 225; *contra, Stoneboro etc. Co.* v. *Lake Shore etc.* (1913) 238 Pa. 289. If there is a conflict of evidence as to whether the negligent operation was on the main or spur track, and the exemption applies to the spur track only, the burden will be upon the railroad to prove facts which will entitle it to the exemption under the contract. *Thomason* v. *Kansas etc. Ry.* (1909) 122 La. 995. While a common carrier is generally under no duty to connect with private sidings, such duty may be imposed by statute or by special circumstances, 1 Wyman, Public Service Corporations, § 817 *et seq.,* and in such cases it would seem that the rule denying a common carrier the right to exempt itself from liability for negligence in the performance of its public duties might well apply. *Cf.* 4 Elliott, Railroads (2nd ed.) § 1645.

CORPORATIONS—DISTRIBUTION OF ASSETS—LIABILITY OF DIRECTORS.—The directors of a corporation, without formal dissolution, distributed its assets among the bondholders, the entire amount being insufficient

to satisfy such claims. In a proceeding by a judgment creditor against the directors under §§ 90, 91 of the General Corporation Law. *held* that any recovery by a creditor was limited to a misapplication of property to which he otherwise would have been entitled. *Curran* v. *Oppenheimer* (N. Y. App. Div. 1914) 150 N. Y. Supp. 369.

At common law, corporate creditors had no right to meddle with the management of the corporation nor to proceed against its directors for misconduct unless such misconduct resulted in dissipating the assets so that insufficient remained to satisfy their claims. 1 Morawetz, Corporations, § 568. To-day, by statute in New York, a creditor is given the right to proceed against directors for misappropriation of assets. General Corporation Law, §§ 90, 91. Thus, where the assets of a corporation have been distributed among the stockholders regardless of outstanding claims, the right of the creditor to proceed against the directors is clear. *Darcy* v. *Brooklyn & N. Y. Ferry Co.* (1909) 196 N. Y. 99. But it has been held that, as at common law, it is only to a party injured that the defendants are to account, see *People* v. *Equitable Life Assurance Society* (1908) 124 App. Div. 714, 739, so that the statute would not seem to create any new rights in a creditor in this regard. Furthermore, according to the revisers' notes these statutory provisions were originally enacted to allow the State to go against directors in equity for mismanagement of corporate affairs. See *People* v. *Equitable Life Assurance Society, supra,* p. 736. In *People* v. *Ballard* (1892) 134 N. Y. 269, the court in an elaborate opinion, decided that the State has an interest separate and distinct from that of a creditor or stockholder, and could therefore maintain an action under §§ 90 and 91 of the General Corporation Laws without a relator. Since, therefore, the wrongful act in question was the failure to comply with the statutory requirements as to dissolution, and no injury had accrued to the plaintiff, since the bondholders, as preferred creditors, were entitled to the entire amount distributed, it would seem that the only right of interference was in the State.

CORPORATIONS—ULTRA VIRES CONTRACTS—RIGHT TO RECOVER.—A corporation contracted to pay the plaintiff commission for securing a factory site for it, and this site he actually acquired. The corporation defends a suit on this contract on the ground that the agreement was in excess of the powers conferred by its charter. *Held,* since the defendant had received benefit under the contract he could not set up *ultra vires* as a defense. *Seamless Pressed Steel etc. Co.* v. *Monroe* (Ind. 1914) 106 N. E. 538. See Notes, p. 267.

COURTS—JURISDICTION—COLLATERAL ATTACK OF PREVIOUS CONVICTION.—The defendant convicted as a second offender, moved for a new trial on the ground that the prior conviction was void because he was at that time under 16 years of age, and therefore not within the jurisdiction of the court. *Held,* since the court in the prior suit had jurisdiction of the subject matter and of the person of the defendant, the validity of its judgment could not be attacked collaterally. *People* v. *De Bellis* (1914) 150 N. Y. Supp. 1064.

Where the court has jurisdiction of the parties and of the subject matter, its judgment is not open to collateral attack. 1 Black, Judgments, § 245. But a party may, even in a collateral attack, show by extrinsic facts that the court had no jurisdiction, though the judg-

ment on its face shows jurisdictional facts. *Ferguson* v. *Crawford* (1877) 70 N. Y. 253; *Harrington* v. *People* (N. Y. 1849) 6 Barb. 607; but see 1 Bailey, Jurisdiction, 136. In States, therefore, where the juvenile courts have exclusive jurisdiction of offenses by children, *State* v. *Dunn* (1907) 75 Kan. 799; *cf. Mill* v. *Brown* (1907) 31 Utah 473, 477, a conviction of a child under the statutory age by any other court, might be subject to a collateral attack. In New York City, however, the Children's Court is merely a special department of the court of Special Sessions, New York Charter (1906) §§ 1399, 1418, and there was, in the principal case, therefore, no lack of jurisdiction of the person of the defendant in the court which convicted him on the prior trial. It follows that the prior conviction could not be collaterally attacked on this ground. The fact that the defendant was at that time below the age at which the statute declares a person amenable to conviction for a crime, N. Y. Penal Law, § 2186, is at most an irregularity which the defendant waived by not taking objection at a seasonable time.

CRIMINAL LAW—LARCENY—ASPORTATION BY INNOCENT AGENT.—The defendant sold a bale of cotton to which he had no title and which was not in his possession. *Semble,* in such a case, when an innocent purchaser removes the property, the seller is guilty of larceny; but where the purchaser knows the seller had no title, removal by him is not asportation by the seller. *Smith* v. *State* (Ga. 1914) 83 S. E. 437.

It is well settled that a person not actively participating may, through an innocent agent, do an act which constitutes a crime. *Adams* v. *People* (1848) 1 N. Y. 173; see Clark, Criminal Law, 101. Although a vendee can hardly be said to act for anyone but himself in assuming control over the property sold, it has sometimes been held that asportation by an innocent purchaser is referable to a guilty vendor, so as to make the latter chargeable with larceny. *Lane* v. *State* (1900) 41 Tex. Cr. 558; *State* v. *Hunt* (1877) 45 Ia. 673; *contra, People* v. *Gillis* (1889) 6 Utah 84. The distinction drawn in the principal case between an innocent purchaser and one having knowledge of the facts seems to arise from the common law rule that where the one acting has sufficient knowledge of the facts to be himself guilty of the crime, the instigator is only accessory before the fact if absent at the time of the act, or a principal in the second degree if present aiding and abetting. *Queen* v. *Manley* (1844) 1 Cox C. C. 104; *Williams* v. *State* (1874) 47 Ind. 568; see *Wixson* v. *People* (N. Y. 1860) 5 Park. Cr. 119, 129. Where by statute, the accessory is made liable for the same crime as the principal, it would seem that the purchaser's knowledge or ignorance of the facts should make no difference in the criminality of the seller, since in the case of a guilty purchaser, the seller, by virtue of the statute, would be guilty of larceny, and if the purchaser were innocent, the vendor might be convicted of larceny under the authorities above cited.

DESCENT AND DISTRIBUTION—STATUTES—EFFECT OF MURDER OF INTESTATE BY HEIR.—A youth murdered his father, mother and sister; he was entitled, as heir, under the statutes regulating descent and distribution, to the estates of his victims. *Held,* the murderer took an absolute estate by descent, and a bill to have him declared a trustee

ex maleficio could not be maintained for want of equity. *Wall* v. *Pfanschmidt* (Ill. 1914) 106 N. E. 785.

While intending to kill his wife's paramour, a man killed his wife. *Held,* his conviction for manslaughter was not an equitable bar to his taking a distributive share in his wife's estate under the New York Statute of Distributions as he had no intention of killing her and profiting by her death. *In re Wolf* (Surr. Ct., N. Y. Co., 1914) 150 N. Y. Supp. 738. See Notes, p. 260.

DESCENT AND DISTRIBUTION—STATUTORY CONSTRUCTION—ILLEGITIMACY.—A statute provided that illegitimate children should be heirs of the property of which their mother died possessed. The mother of the claimants was illegitimate, and died prior to the enactment of the statute. The claimants, as heirs through their mother, claimed the estate of their grandmother, who died after the enactment of the statute. *Held,* they were entitled to the estate. *Trout* v. *Burnette* (S. C. 1914) 83 S. E. 684.

At common law an illegitimate child can not be an heir, and it can have no heirs other than those of its own body. 1 Blackstone, Comm. *459. In one state, by decisions substantially following the Roman Law, *Dickinson's Appeal* (1875) 42 Conn. 491, and in most of the other states by statute, this harsh rule of the common law has been modified. Some states permit a bastard to inherit from the father, if during his lifetime, the father has recognized the bastard as his own child. See *Morin* v. *Holliday* (1906) 39 Ind. App. 201; *Rohrer* v. *Muller* (1900) 22 Wash. 151. Practically everywhere, an illegitimate child may now inherit from its mother. See *Foster* v. *Lee* (1911) 172 Ala. 32; *Berry* v. *Powell* (1907) 101 Tex. 55. As these statutes are in derogation of the common law, many courts have held that in the absence of express provision, they confer no right of inheritance upon the issue of the illegitimate child as to the property of the latter's mother. *Curtis* v. *Hewins* (Mass. 1846) 11 Metc. 294; *Truelove* v. *Truelove* (1909) 172 Ind. 441. Some courts, however, as in the principal case, have regarded such legislation as remedial, and upon principles of representation as established by local statutes, have given the same rights of inheritance to the bastard's issue. *Goodell* v. *Yezerski* (1912) 170 Mich. 578; see *Sutton* v. *Sutton* (1888) 87 Ky. 216. Such a result is a fair interpretation of the legislative intent, and is representative of the more liberal views now taken of the status of illegitimate children.

EQUITY—INJUNCTION—JURISDICTION OVER CRIMINAL PROCEEDINGS.—Repeated prosecutions under a city ordinance were instituted against the plaintiff with a view to injuring her in her business. *Held,* equity had jurisdiction to enjoin such proceedings although they were of a criminal nature. *Cutsinger* v. *City of Atlanta* (Ga. 1914) 83 S. E. 263.

In the absence of an injury to property rights a court of equity is without jurisdiction to restrain the commission of acts merely criminal, *People* v. *Condon* (1902) 102 Ill. App. 449; *People* v. *District Court* (1899) 26 Colo. 386, except where a private citizen may by virtue of a statute bring suit to abate a public nuisance. *Littleton* v. *Fritz* (1885) 65 Iowa, 488. It may be said, moreover, that ordinarily equity has no jurisdiction to enjoin criminal proceedings, *Minneapolis Brewing Co.* v. *M'Gillivray* (C. C. 1900) 104 Fed. 258; *Moses* v. *Mobile* (1875) 52 Ala. 198; see *In re Sawyer* (1888) 124 U. S. 200. Where,

however, the act complained of is such that equity will otherwise interfere for the protection of the rights of property, the mere fact that incidental thereto a crime must be enjoined will not operate to deprive equity of jurisdiction if there be no adequate remedy at law. See *Christie Street Comm. Co.* v. *Board of Trade* (1900) 92 Ill. App. 604. Upon the same principle, if the enforcement of an unconstitutional statute in criminal proceedings works irreparable injury, aid should not be refused and the enforcement thereof should be enjoined. See *Minneapolis Brewing Co.* v. *M'Gillivray, supra*; *Linsley* v. *Natural Carbonic Gas Co.* (1908) 162 Fed. 954. It has been intimated in one jurisdiction that a mere multiplicity of prosecutions under an invalid ordinance might be enjoined on the theory that such prosecutions tend to harass the complainant. See *South Covington etc. Ry.* v. *Berry* (1892) 93 Ky. 43; but see *Ewing* v. *Webster City* (1897) 103 Iowa, 226. The principal case seems perfectly sound in deciding that equity had jurisdiction to stay proceedings under a city ordinance where, in such proceedings, the effort was made unlawfully to effect the plaintiff's property rights. *Port of Mobile* v. *Louisville etc. Ry.* (1887) 84 Ala. 115; *Atlanta* v. *Gate City Gaslight Co.* (1883) 71 Ga. 106, 126.

EVIDENCE—BEST EVIDENCE RULE—WHEN SECONDARY EVIDENCE ADMISSIBLE.—The plaintiff sued on a contract evidenced by a letter, the possession of which had been fraudulently obtained by the defendant. *Held,* secondary evidence was admissible to prove the contents of the letter without notice to the defendant to produce. *Prieto* v. *Hunt* (Tex. Civ. App. 1914) 167 S. W. 4.

It is well settled that where a written instrument is evidence of rights, it forms the best proof of its contents, and secondary evidence for that purpose is inadmissible unless the non-production of the instrument be legally excused. 2 Wigmore, Evidence, § 1192; Jones, Evidence (2nd ed.) § 200; *Security Trust Co.* v. *Robb* (C. C. A. 1906) 142 Fed. 78. If the proponent has lost the document upon which he predicates his rights, he may introduce secondary evidence of its contents, the loss being a legal excuse for its non-production; *Tayloe* v. *Riggs* (1828) 1 Pet. 591; or if the instrument be in the hands of the adverse party, who refuses to produce it after notice so to do, secondary evidence is admissible. *Gafford* v. *American etc. Co.* (1889) 77 Ia. 736. While notice to the party holding the instrument is usually necessary, in order to show his unwillingness to produce, it is not required when the party has obtained the document from the proponent by fraudulent or forcible means. *Scott* v. *Pentz* (N. Y. 1852) 5 Sandf. 572; *Almy* v. *Reed* (Mass. 1852) 10 Cush. 421; 2 Wigmore, Evidence, § 1207; *cf. Grimes* v. *Kimball* (Mass. 1862) 3 Allen 518. Moreover, where the form of the action or of the pleading gives the party notice to be prepared to produce the instrument, no further notice is required. *Hardin* v. *Kretsinger* (N. Y. 1820) 17 Johns. *293; *Hammond* v. *Hopping* (N. Y. 1835) 13 Wend. 505; *cf. Nealley* v. *Greenough* (1852) 25 N. H. 325. In some States these requirements as to notice have been embodied in statutes, California Code Civ. Proc. § 1938; Idaho Code Civ. Proc. § 5991; Compiled Laws of Utah (1907) § 3401.

HUSBAND AND WIFE — DESERTION — ANTE-NUPTIAL CONTRACTS AS TO RESIDENCE.—A wife refused to live at the home of her husband's parents

because she was unable to live there happily, and the plaintiff refused to provide her a separate home. In an action for divorce by the husband, *held,* her refusal did not constitute desertion, and her ante-nuptial agreement to live at the home of her husband's parents was not binding. *Marshak* v. *Marshak* (Ark. 1914) 170 S. W. 567.

It is well settled that the personal rights and duties of husband and wife growing out of the marital relation are in no manner affected by ante-nuptial contracts, Schouler, Domestic Relations (5th ed.) §§ 38, 171; *Hair* v. *Hair* (S. C. 1858) 10 Rich. Eq. 163, 175, hence the sole question in the principal case is whether the wife's acts, independent of her ante-nuptial agreement, amount to desertion. At common law the husband had the right to fix the matrimonial domicile anywhere in the world, and the wife's refusal to follow constituted desertion. 1 Nelson, Divorce & Separation, § 68. The general principles of this rule have been adopted by numerous decisions in this country, *Messenger* v. *Messenger* (1874) 56 Mo. 329; *Kennedy* v. *Kennedy* (1877) 87 Ill. 250; *Hunt* v. *Hunt* (1878) 29 N. J. Eq. 96; *Franklin* v. *Franklin* (1906) 190 Mass. 349, but usually subject to the qualification that the husband's power must be reasonably exercised; *Franklin* v. *Franklin, supra;* and at least one court has held that he must show such reasonableness by positive, affirmative evidence. *Gleason* v. *Gleason* (1857) 4 Wis. 64. In accordance with this tendency it has repeatedly been held that establishing the domicile at the home of the husband's parents may be unreasonable, *Wright* v. *Wright* (N. J. 1899) 43 Atl. 447; see *Albee* v. *Albee* (1890) 43 Ill. App. 370; *Mossa* v. *Mossa* (N. Y. 1908) 123 App. Div. 400, and one court has even held that the wife is justified in refusing to live near the husband's relatives. *Powell* v. *Powell* (1856) 29 Vt. 148. Although this qualification may be a marked deviation from the common law rule, see 1 Nelson, Divorce & Separation, § 68, and, perhaps, goes a step too far in this matter, yet the decision in the principal case seems to be quite in accordance with the policy of the modern courts pertaining to married women, and in effect, both just and salutary.

INSURANCE—CHANGE OF RISK BETWEEN APPLICATION AND ACCEPTANCE—DUTY TO COMMUNICATE.—An applicant for life insurance failed to notify the company of an attack of renal colic which he suffered between the date of the application for the policy and its delivery. *Held,* such failure constituted a fraud which avoids the policy. *Harris* v. *Security Mutual Life Ins. Co.* (Tenn. 1914) 170 S. W. 474.

Concealment of material facts coming to the knowledge of an applicant for insurance after the application, and before its acceptance is generally held to avoid an insurance contract, *Piedmont etc. Ins. Co.* v. *Ewing* (1875) 92 U. S. 377; *Carleton* v. *Patron's etc. Ins. Co.* (1912) 109 Me. 79; *Whitley* v. *Piedmont etc. Ins. Co.* (1874) 71 N. C. 480, but it is to be borne in mind that such acceptance may antedate the issuance of the policy. 1 May, Insurance (4th ed.) § 191; Vance, Insurance, § 95; but see *Merchant's etc. Ins. Co.* v. *Lyman* (1872) 82 U. S. 664. There is some authority for the view that an insurance company issuing a policy in reliance upon representations which it knows to have been made some time before, assumes the risk of a subsequent change in conditions. *Day* v. *Hawkeye Ins. Co.* (1887) 72 Iowa 597; *Insurance Co.* v. *Higginbotham* (1877) 95 U. S. 380. The better position, however, would seem to be that until the consummation of the contract there is a continuing representation that the statements

in the application are true. 1 May, Insurance (4th ed.) § 190. Since the facts are peculiarly within the knowledge of the applicant and difficult for the insurer to ascertain, the parties can hardly be said to deal at arm's length, *Equitable Life Assurance Soc.* v. *McElroy* (C. C. A. 1897) 83 Fed. 631, and the principal case is therefore correct in holding that one who obtains insurance by silence as to a material change of circumstances since his application, is guilty of such fraud as to vitiate the contract.

INTOXICATING LIQUORS—ISSUANCE OF LICENSE—CONSENT OF INFANT RESIDENCE OWNERS.—A statute required that a petition for a license to sell intoxicating liquors be accompanied by the consent of two-thirds of the residence owners within 300 feet of the proposed site. The petitioner's application contained among the required number of consents that of two infant residence owners. *Held,* since the consent of these infants was not valid the application was insufficient. *In re Farley* (N. Y. 1914) 106 N. E. 756.

The contracts of an infant are not valid and binding, but are voidable by him within a reasonable time after he reaches majority, Pollock, Contracts (8th ed.) 56, 58; 11 Columbia Law Rev. 468, and while the early rule was that an infant's act of appointing an agent was absolutely void, Mechem, Agency, §§ 51, 52, the more recent doctrine is that the act of appointing the agent is not void and that an infant may contract voidably through an agent as well as in person. Huffcut, Agency (2nd ed.) § 15. In cases where an infant contracts concerning his property or rights either through an agent or for himself the infant is the only one who would suffer through his lack of discretion, were the contracts enforcible against him. In the principal case, however, an entirely different situation is presented. The location of a liquor store affects no one consenting party alone, but the entire neighborhood. If valid, an infant's consent might be the determining element, and if it were merely voidable it might have the same effect temporarily. Accordingly, in the only two previous cases where the question has come before the courts, it has been held that infants are not competent to pass upon such a subject. *Thompson* v. *Eagan* (1903) 70 Neb. 169; *People* v. *Griesbach* (1904) 211 Ill. 35, and what an infant may not do himself he could not do by an agent.

LANDLORD AND TENANT—LEASE AFTER MORTGAGE—ATTORNMENT TO MORTGAGEE.—The plaintiff brought suit upon a lease in writing for rent accruing since the demised premises were sold in foreclosure proceedings under a mortgage he had given before the execution of the lease. The defendant pleads attornment and payment to the mortgagee after the latter had purchased at foreclosure but before he received the deed. *Held,* the plaintiff cannot recover. *Hinck* v. *Cohn* (N. J. 1914) 92 Atl. 378.

The time at which a mortgagee may secure possession of the mortgaged premises has varied with development of our law. Originally, in the absence of any agreement to the contrary, he could bring ejectment for them whenever he pleased. See *Green* v. *Kemp* (1816) 13 Mass. 515. In some jurisdictions he is still entitled to possession of the land after default. *Shields* v. *Lozear* (1869) 34 N. J. L. 496. In others the right is denied to him entirely unless he has already entered into possession with the consent of the mortgagor. See *Barson* v. *Mulligan* (1908) 191 N. Y. 306; N. Y. Code Civ. Proc., § 1498. When,

however, the right to possession does vest in a mortgagee or one claiming through him, or in a purchaser at the sale, such person may then eject either the mortgagor or one to whom the latter has leased the premises since giving the mortgage. See *Knowles* v. *Maynard* (Mass. 1847) 13 Metc. 352; *Western Union Tel. Co.* v. *Ann Arbor R. R.* (1898) 61 U. S. App. 741. A tenant may plead in defence to a suit for rent by the mortgagor that he has thus been evicted by paramount title. *Simers* v. *Saltus* (N. Y. 1846) 3 Den. 214. He may also show, that to avoid actual eviction by the one who was entitled to immediate possession he attorned to him, *Smith* v. *Shepard* (Mass. 1833) 15 Pick. 147, for he then in fact proves that he has been constructively evicted. *Jones* v. *Clark* (N. Y. 1822) 20 Johns. *51; *Anderson* v. *Robbins* (1890) 82 Me. 422; I Tiffany, Landlord and Tenant, § 73. In the principal case there was some question as to whether attornment to the mortgagee had been properly pleaded; assuming that it had, the case is clearly sound, for in New Jersey a mortgagee has the right to possession immediately upon default. See *Mershon* v. *Castree* (1895) 57 N. J. L. 484.

LANDLORD AND TENANT—MARRIED WOMEN'S ACTS—LEASE AS CONVEYANCE OR INCUMBRANCE.—A married woman leased her separate real property without her husband's consent. The Statute providing that no married woman should convey or encumber her separate real estate except by deed in which her husband should join, was *held* not to invalidate the lease. *Spiro* v. *Robertson* (Ind. App. 1914) 106 N. E. 726. See Notes, p. 265.

LANDLORD AND TENANT—WASTE COMMITTED BY STRANGER—TENANT'S DAMAGES.—A life tenant sued for the defendant's negligence in setting fire to the premises. *Held,* he could recover for all damages, both to the life estate and to the inheritance, although he would not be liable to the remainderman for the defendant's act. *Rogers* v. *Atlantic, Gulf & Pacific Co.* (1915) 213 N. Y. 246. See Notes, p. 253.

LIBEL AND SLANDER—APPLICATION FOR PARDON—PRIVILEGE.—The defendant, an attorney, in an application to the governor for a pardon for his client charged the plaintiff who was instrumental in bringing about the conviction as being an "unprincipled, blackmailing, depraved scoundrel". *Held,* since the charge was irrelevant, it was not protected by the absolute privilege of the occasion. *Andrews* v. *Gardner* (N. Y. App. Div. 1914) 150 N. Y. Supp. 891.

The rule adopted by the English court as to privilege is that if the privilege of the occasion is absolute, no statement made upon such an occasion can be questioned. In this country, however, the use of the term absolute occasion is misleading, since the courts generally follow the early English cases, holding that although irrelevant as well as relevant communications may be protected by such privileged occasion, yet if the statements are irrelevant they are only conditionally privileged. 9 Columbia Law Rev. 600. Under the English rule, therefore, the assumption made by the court in the principal case that an application for a pardon furnishes an absolute privilege, *Connellee* v. *Blanton* (Tex. 1914) 163 S. W. 404, would defeat the plaintiff's claim. If, on the other hand, under the circumstances of a petition for a pardon to the governor, the occasion is said to be conditionally or qualifiedly privileged, it will not serve as a blanket

protection for wholly irrelevant statements. In such a case, a communication is privileged and protected by the occasion only when relevant thereto. Odgers, Libel & Slander (5th ed.) 304; *Moore* v. *Manufacturers' Nat. Bank* (1890) 123 N. Y. 420, 427; *Robinett* v. *Ruby* (1858) 13 Md. 95. There can be little doubt that certain communications would be irrelevant and immaterial if made in judicial proceedings, while they would be very effective in an appeal to the clemency of the governor whose pardoning power is uncontrolled. This, indeed, might be a reason for the adoption of a liberal view by the court as to what is relevant on such an occasion, but as was said in the principal case, it should be assumed that the governor "would not be moved by mere caprice or purely quixotic considerations," although, in the light of recent history, such assumption may be contrary to the facts. The governor may have the power to act on any consideration, but surely his right is morally limited by his duty to the State.

LIBEL AND SLANDER—IMPUTING NEGRO BLOOD TO WHITE PERSONS—WHEN ACTIONABLE.—The defendant circulated untrue oral reports that the plaintiff and his family were negroes, which resulted in the exclusion of the plaintiff's children from white-school privileges. *Held,* such conduct is actionable. *Spencer* v. *Looney* (Va. 1914) 82 S. E. 745.

Since the plaintiff in the principal case proved special damage, to hold the words actionable was clearly correct. But since the courts have been unwilling to enlarge the category of oral words actionable *per se* beyond its common-law limitations, see *Williams* v. *Riddle* (1911) 145 Ky. 459, even in the face of tempting opportunity, see *Pollard* v. *Lyon* (1875) 91 U. S. 225, allegations imputing negro blood to whites are generally not actionable *per se,* even in the southern States. Newell, Slander & Libel (3rd ed.) 99, n. 14; *Williams* v. *Riddle, supra; McDowell* v. *Bowles* (1860) 53 N. C. 184; *Barrett* v. *Jarvis* (Ohio 1818) 1 Tappan 244; *Johnson* v. *Brown* (1832) 4 Cranch. C. C. 235. In South Carolina and Louisiana, however, it is unnecessary to show special damages to establish a cause of action, even when such objectionable remarks are oral; but this result is achieved in the latter jurisdiction only by straining a local code provision. *Eden* v. *Legare* (S. C. 1791) 1 Bay 171; *King* v. *Wood* (S. C. 1818) 1 Nott. & M. 184; *Spotorno* v. *Fourichon* (1888) 40 La. Ann. 423. Since courts deal more sternly with false allegations made in written form, see *Williams* v. *Riddle, supra,* it is not surprising to find that in these two jurisdictions written assertions of this nature are actionable without proof of special damage. *Flood* v. *News & Courier Co.* (1904) 71 S. C. 112; *Upton* v. *Times Democrat Pub. Co.* (1900) 104 La. 141. These latter cases are clearly correct on principle, since the false written statements tend to subject the victim to the hatred, ridicule or contempt of a considerable portion of the community and to promote breaches of the peace. The defendant, however, should be permitted to show proof of immediate printed retraction and apology, in mitigation of damages. *Cf. Upton* v. *Times-Democrat Pub. Co., supra.*

PARENT AND CHILD—DUTY OF CHILD TO PAY BURIAL EXPENSES OF INDIGENT PARENT.—On objection by an infant's special guardian, to a charge by the general guardian for burial expenses of the infant's mother, *held,* the charge is allowable, since equity thus enforces the

moral duty of an infant to support or bury an indigent parent. *In re Connolly's Estate* (1914) 150 N. Y. Supp. 559.

Though at common law a child was under no obligation to support an indigent parent, *Becker* v. *Gibson* (1880) 70 Ind. 239; 2 Kent, Comm. *208; see *Dominus Rex* v. *Munden* (1718) 1 Str. 190, such a duty was imposed by Statute, 43 Eliz. c. 5, and by similar enactments in this country. On principle it would seem that a recovery in quasi-contract might be allowed against a child whose statutory duty has been discharged by another, since the child is unjustly enriched to that extent, but it is held that the duty can be enforced only by statutory procedure. *Edwards* v. *Davis* (N. Y. 1819) 16 Johns. 281; *Duffy* v. *Yordi* (1906) 149 Cal. 140. The court in the principal case admits that the New York Statute on this point has been repealed, but rests its decision on precedents in equity. In determining the amount to be allowed for the support of an infant, courts of equity have granted to an eldest son enough to enable him suitably to support his younger brothers and sisters, *Wellsley* v. *Duke of Beaufort* (1827) 2 Russ. *1, *28; *Petre* v. *Petre* (1747) 3 Atk. *511; see *Lanoy* v. *Duke of Athol* (1742) 2 Atk. *444, *447, and even to maintain an illegitimate brother; *Bradshaw* v. *Bradshaw* (1820) 1 J. & W. Ch. *627; and in a few cases allowance has been made for the support of indigent parents. *Roach* v. *Garvan* (1848) 1 Ves. Sr. 157, 160; *Heysham* v. *Heysham* (1785) 1 Cox. Eq. 179; *cf. Matter of Bostwick* (N. Y. 1819) 4 Johns. Ch. 100, 105. Such expenditures are considered as made for the proper maintenance and advancement of the infant himself, since it is to his interest to have his family suitably supported. *Allen* v. *Coster* (1839) 1 Beav. *202. Since burial expenses are analogous to support, the doctrine of the principal case, though perhaps influenced by the smallness of the amount in question, and the fact that the expense had been already incurred, is supported on this ground by authority, and is commendable in its incidental enforcement of one of the most sacred duties of filial respect.

PLEADING AND PRACTICE—NEW YORK CODE OF CIVIL PROCEDURE—SUITS BY NON-RESIDENT AGAINST A FOREIGN CORPORATION UNDER § 1780.—A foreign corporation, doing business in New York State, brought suit in the Supreme Court against a foreign corporation not engaged in business within the State. *Held,* the court had no jurisdiction of the action. *United States Asphalt Refining Co.* v. *Comptoir Nationale d' Escompte de Paris* (N. Y. App. Div. 1915) 52 N. Y. L. J. 113.

By § 1780 of the Code of Civil Procedure, the legislature has limited the right of a non-resident to sue a foreign corporation to certain specified instances. The jurisdiction of the New York courts over such suits was enlarged in 1913 by the addition of subdivision 4 to § 1780, which provided that "an action against a foreign corporation may be maintained by another foreign corporation or by a non-resident. * * * 4. Where a foreign corporation is doing business within the State." Since § 1779 provides under what circumstances a foreign corporation may sue, and since § 1780 is entitled "When a foreign corporation may be sued," the court in the principal case was clearly justified in deciding that the words "a foreign corporation" were limited in their application to the defendant, and that the fact that the plaintiff was engaged in business within the State did not suffice to give the court jurisdiction.

PUBLIC SERVICE CORPORATIONS—TELEGRAPHS AND TELEPHONES—EXCLUSIVE CONTRACTS RESULTING IN MONOPOLY—PUBLIC POLICY.—A contract between a railroad and a telegraph company by which the latter was given the exclusive right to construct and operate telegraph lines along the right of way, was *held* contrary to public policy and void. *Western Union Tel. Co.* v. *Postal Tel. Co.* (C. C. A. 1914) 217 Fed. 533.

Under federal statutes, sustained by liberal interpretation of constitutional provisions, any telegraph company desiring to construct a telegraph line along a railroad right of way is entitled, subject to certain limitations, to do so. U. S. Const., Art. 1, § 8, subd. 3 & 7; U. S. Rev. Stat. § 3964; U. S. Rev. Stat. § 5263; see *Pensacola Tel. Co.* v. *W. U. Tel. Co.* (1877) 96 U. S. 1. Contracts such as that set up by the appellant are invariably declared invalid by the courts, federal and State alike, usually both as in restraint of trade and as in contravention of the statutes. See *W. U. Tel. Co.* v. *American U. Tel. Co.* (U. S. 1879) 9 Bis. 72; *W. U. Tel. Co.* v. *Burlington etc. Ry.* (1882) 11 Fed. 1; *Union Trust Co.* v. *Postal Tel. Cable Co.* (1895) 8 N. Mex. 327; *W. U. Tel. Co.* v. *American U. Tel. Co.* (1880) 65 Ga. 160. In the federal courts, however, it seems unnecessary to go behind the statute, which is clearly hostile to monopoly, U. S. Rev. Stat. § 5263; *W. U. Tel. Co.* v. *Baltimore etc. Tel. Co.* (1884) 19 Fed. 660; and any State enactment attempting to confer exclusive privileges upon a single company will be declared inoperative. *Pensacola Tel Co.* v. *W. U. Tel. Co., supra.* According to modern economic theory the telegraph is a natural monopoly, and it is thought that the public will be served better by a single company controlling all the facilities than by competition. See Hadley, Economics, § 168; Seager, Introduction to Economics (3d ed.) § 251. But the law, regarding monopoly as dangerous to the public welfare, has, broadly speaking, generally favored competition, even at the cost of its inevitably concurrent economic factor, duplication of capital. See Wyman, Control of the Market, ch. 6 & 8. Certainly, it would be improper to permit one company to call upon the courts to assist in the strangulation of a competitor by enforcing discriminatory contracts or by justifying other questionable methods, no matter how desirable the result to those accepting the newer economic theory.

REAL PROPERTY—POSSIBILITY OF REVERTER—CHARITABLE TRUSTS.—Trustees of land donated for charitable purposes sold it to a railroad to avoid condemnation, and reinvested the proceeds in other property to be similarly used. The heirs of the original donor claimed the land reverted to them because of the sale. *Held,* it did not revert, but the heirs had reversionary rights in the new property purchased by the trustees. *Lutes* v. *Louisville & N. R. R.* (Ky. 1914) 164 S. W. 792.

An estate upon collateral limitation reverts to the grantor or his heirs upon the happening of the event which terminates the estate. Gray, Perpetuities (3rd ed.) § 13. But the courts generally construe grants for charitable purposes as creating charitable trusts or the restrictions concerning their use as operating only as covenants, and do not allow the property to revert unless the donor expressly stipulated that it should. 2 Perry, Trusts (6th ed.) § 744; *Strong* v. *Doty* (1873) 32 Wis. 381; *Griffitts* v. *Cope* (1851) 17 Pa. 96; see note, 19,

L. R. A. 263. The trustees of such property, moreover, may sell it if they are authorized to do so by the legislature, *Petition of Van Horne* (1893) 18 R. I. 389; *Littell* v. *Wallace* (1882) 80 Ky. 252, or permitted by a court of equity. *Bridgeport Library* v. *Burroughs Home* (1912) 85 Conn. 309; see note, Gray, Perpetuities (3rd ed.) 472. In the jurisdiction of the principal case property donated for charitable purposes, if no longer used for the specified purpose, reverts even in the absence of an express provision, *Grundy* v. *Neal* (1912) 147 Ky. 729, and an unauthorized contract to sell is sufficient diversion from the purpose specified. *Trustees of Presbyterian Church* v. *Alexander* (Ky. 1898) 46 S. W. 503. Since no permission to sell had been obtained in the principal case the property would, under the Kentucky law, seem to revert, and since the plaintiffs were neither the grantors nor the heirs of the grantor of the estate purchased with the proceeds of the land originally donated, there is no authority for giving them a possibility of reverter in that estate.

REAL PROPERTY—TENANCY BY THE ENTIRETY—EFFECT OF DIVORCE.—The plaintiff, claiming through the divorced husband of the defendant, asks for partition of lands which had been held by the latter in entirety with the plaintiff's grantor. *Held,* the divorce converted the tenancy by entirety to a tenancy in common, and the plaintiff is therefore entitled to partition. *McKinnon, Currie & Co.* v. *Caulk* (N. C. 1914) 83 S. E. 559.

It has been held in a few jurisdictions that a divorce has no effect on a tenancy by the entirety because the quality of the estate is determined at its inception and should no more be affected by a subsequent severance of the marriage relation than is an estate already existent affected by the creation of the same. *Alles* v. *Lyon* (1907) 216 Pa. 604. To this reason has been added a reluctance to see the party at fault profit by his or her own wrong. *In re Lewis* (1891) 85 Mich. 340. But the only reason that a man and wife do not take by moities is that while the coverture lasts they are in the eye of the law but one. *Russell* v. *Russell* (1894) 122 Mo. 235. A decree of divorce, therefore, which destroys their artificial identification removes the only barrier to their holding individual interests in the land, and enables the conveyance then to have its full effect. *Harrer* v. *Wallner* (1875) 80 Ill. 197. Accordingly, a decree of divorce leaves the parties to hold by whatever form of co-tenancy the particular law of their jurisdiction would have placed them in at the start. See *Enyeart* v. *Kepler* (1888) 118 Ind. 34. The common law favored joint tenancy and in the absence of statute abolishing it words apt for its creation will govern after divorce. *Thornley* v. *Thornley* L. R. [1893] 2 Ch. 229; *Lash* v. *Lash* (1877) 58 Ind. 526. To-day, however, in view of the statutory disfavor in which that form of co-tenancy has fallen, a divorce almost universally makes the parties tenants in common. *Stelz* v. *Schreck* (1891) 128 N. Y. 263; *Hayes* v. *Horton* (1905) 46 Or. 597.

SPECIFIC PERFORMANCE—RENTS PROFITS AND INTEREST.—In May, 1906, an option for the sale of land was accepted, and in March, 1912, the vendor, after years of litigation, was finally awarded title to the property by a judicial decision. In May, 1913, the vendee paid the purchase price into court, and notified the seller of the fact. In a suit for specific performance by the vendor, it was *held* that the purchaser

must pay interest on the purchase price from March, 1912, until May, 1913. *Wilson* v. *Seybold* (D. C. W. Va. 1914) 216 Fed. 975. See Notes, p. 256.

STATUTES—EXAMINATION OF JOURNALS TO IMPEACH VALIDITY OF ENROLLED BILL.—Mandamus was brought to compel election commissioners to proceed under an old statute on the ground that the one repealing it did not pass the legislature by a majority vote. The journal, which was required by constitution to record the yeas and nays, stated that a number amounting to a majority voted in favor of the statute but showed a list voting "yea" less in number. *Held,* the act was invalid, since the journals proved that it was not constitutionally passed. *State ex rel. Schmoll* v. *Drabelle* (Mo. 1914) 170 S. W. 465.

The duty of the courts to pass on the constitutionality of legislative acts has been interpreted in many jurisdictions to include the necessity of looking behind enrolled bills to see that the legislators have, in their procedure, complied with constitutional requirements. *Opinion of the Justices* (1858) 35 N. H. 579; *Rode* v. *Phelps* (1890) 80 Mich. 598; *State* v. *Nashville Baseball Club* (1913) 127 Tenn. 292. But the opposite view has been taken in a very strong line of decisions, which refuse to subject a law, publicly proclaimed and acted upon, to the danger of being undermined by evidence from a carelessly compiled journal. *Pacific R. R.* v. *Governor* (1856) 23 Mo. 353; *Ex parte Wrenn* (1886) 63 Miss. 512; *State* v. *Wheeler* (1909) 172 Ind. 578. The better reasoned cases recognize the judicial duty to see that constitutional requirements are observed, but accept the solemn assurance of the governor and presiding officers of the legislature as unimpeachable evidence of the proceedings of the co-ordinate branches of government. *Field* v. *Clark* (1892) 143 U. S. 649; *Lafferty* v. *Huffman* (1896) 99 Ky. 80; *Atlantic Coast Line R. R.* v. *State* (1910) 135 Ga. 545. Even the decisions upon which the decision in the principal case is based, recognize a strong presumption in favor of the regularity of the enrolled bill, which would not be sufficiently rebutted by doubtful evidence in the journal. *State* v. *Frank* (1901) 61 Neb. 679; *Missouri etc. Ry.* v. *Simons* (1907) 75 Kan. 130; *Goff* v. *Rickerson* (1911) 61 Fla. 29. The principal case, in allowing conflicting evidence from the journals to impeach an enrolled bill, seems to give very little weight to this presumption.

TAXATION—NOTES AND MORTGAGES—SITUS FOR PURPOSES OF INHERITANCE TAX.—A resident of Florida carried on a loaning business in Iowa in charge of a local agent who, a few days before his principal's death, removed certain notes and mortgages on Iowa land securing them to Wisconsin, where they remained until after her death. *Held,* these notes and mortgages were taxable in Iowa, since they were constructively within the State, and had a business situs there. *In re Adams' Estate* (Iowa 1914) 149 N. W. 531.

Because of the doctrine *mobilia sequuntur personam,* the State in which a decedent was domiciled may tax all of his personal property regardless of its actual situs. *Gallup's Appeal* (1904) 76 Conn. 617; see *Blackstone* v. *Miller* (1903) 188 U. S. 189. The only difficulty arises when a State seeks to tax the personal property of a person not domiciled within it, and under such circumstances various rules

have been announced. Where securities or evidences of indebtedness are physically within the jurisdiction they are taxable as property, irrespective of the owner's domicile. *Matter of Romaine* (1891) 127 N. Y. 80; *Lewis's Estate* (1902) 203 Pa. 211; *In re Stanton's Estate* (1905) 142 Mich. 491. Where such documents are owned by a non-resident and are actually outside of the State, although they evidence rights against residents, there is a diversity of opinion. On the one hand it is held that there is nothing within the State which is taxable, *Matter of Bronson* (1896) 150 N. Y. 1; *Gilbertson* v. *Oliver* (1906) 129 Ia. 568; *Matter of Preston* (N. Y. 1902) 75 App. Div. 250, for the residence of the obligor gives no situs to the property. And on the other hand, it is held, that since the foreign owner must resort to domestic courts to enforce his rights, the protection accorded by the State renders the property amenable to taxation. *In re Merriam's Estate* (1907) 147 Mich. 630; *In re Rogers' Estate* (1907) 149 Mich. 305; *cf. Matter of Houdayer* (1896) 150 N. Y. 37. On the same ground, it is held that where credits are acquired within a State in the course of a business habitually carried on there they are taxable in the State of their origin without reference to the domicile of the creditor or the actual situs of the evidences of indebtedness. *Metropolitan Life Ins. Co.* v. *New Orleans* (1907) 205 U. S. 395; *Bristol* v. *Washington County* (1900) 177 U. S. 133. It is on the second theory, that of protection, that the principal case must rest, and on that ground it is perfectly sound.

TAXATION—WAR REVENUE—EXPORTS.—Suit was brought to recover money paid under the War Revenue Act of 1898, (30 U. S. Stat. L. 461), levying a tax on all policies of insurance including marine insurance, on the ground that the tax was unconstitutional. *Held,* since the charge did not amount to a tax on exports, it did not violate Art. 1, § 9 of the Constitution. *Thames & Mersey Marine Ins. Co.* v. *United States* (D. C. S. D. N. Y. 1914) 217 Fed. 683.

The provision in this statute putting a tax on charter parties was *held* to be to that extent unconstitutional, in that it imposed a tax on exports in violation of Article 1, § 9 of the Constitution. *Hvoslet* v. *United States* (D. C. S. D. N. Y. 1914) 217 Fed. 680.

Taxes which apply to property and manufactures generally are not invalid, merely because some of the articles are later exported. *Pace* v. *Burgess* (1875) 92 U. S. 372; *Cornell* v. *Coyne* (1904) 192 U. S. 418, 429. On the other hand, a tax is not constitutional if it really imposes a duty on exports, although it does so indirectly. Consequently the prohibition in Article 1, § 9 has been extended to include not only the goods themselves, but also the documents pertaining to their carriage. Taxes on bills of lading and warehouse receipts have accordingly been declared invalid. *Fairbank* v. *United States* (1901) 181 U. S. 283, 295; *Selliger* v. *Kentucky* (1909) 213 U. S. 200, 207. It is to this class that the second principal case belongs, and the decision seems clearly correct on principle and authority. It is difficult to see why the same reasoning would not apply as well to policies of marine insurance as to charter parties. Of course it may be urged that since the Supreme Court has consistently declared that insurance policies are not articles of interstate commerce, see *New York Life Ins. Co.* v. *Deer Lodge County* (1913) 231 U. S. 495; *Hooper* v. *California* (1895) 155 U. S. 648; *Paul* v. *Virginia* (1868) 8 Wall. 168, they

cannot be classed as exports. But even if the policies are not all exports, a tax on marine insurance policies would nevertheless seem to be void for the reason that it is an attempt indirectly to impose a tax upon the insured articles which are exported.

WILLS—FORM—EXTRINSIC EVIDENCE TO ESTABLISH AN INSTRUMENT AS A WILL.—The proponent offered for probate as a will, an envelope and two papers enclosed. Nothing appeared upon the face of the papers to show that they were executed with a testamentary intent. *Held,* parol evidence was inadmissible to show that the deceased intended the papers to operate as his will. *Maris* v. *Adams* (Tex. 1914) 166 S. W. 475. See Notes, p. 258.